Legal Letters by Andrew Agatston -The Legal List 2/22/13

A Legal Analysis of Delayed Disclosure Evidence

One of the cases I ran across over the winter break was a 1998 case from the U.S. Court of Appeals for the Armed Forces, *U.S. v. Rynning.*

The testimony of the victim, who was the daughter of the Defendant, was the primary evidence in the case, as there was no physical or medical evidence to substantiate her claims. On cross-examination, the victim was vigorously questioned about her delayed and incomplete disclosures of the claims, the lack of detail in describing the events, her prior inconsistent statements made related to the incidents, and even her continuing affection for her father.

In rebuttal, the government tendered the testimony of an expert in child sexual abuse, as well as the social worker who took the first disclosure of the alleged abuse. As the appellate court wrote in the opinion, ***"The Government's theory of admissibility was that the testimony of the two witnesses explained to the members (jurors) that certain seemingly counterintuitive aspects of (the victim's) behavior were not inconsistent with the type of behavior exhibited by victims of child sexual abuse."***

That is an important phrase: "counterintuitive behavior." It means "counterintuitive" in terms of how a layperson juror would view such information. Thus, if credibility is critical in trial work, and it is, then "counterintuitive behavior" that is left unexplained can be an *attacker* of credibility.

But first things first. Are you in a jurisdiction that will allow evidence, rebuttal or otherwise, to explain the "counterintuitive" behavior of child abuse victims? The competent and qualified lawyer of your organization's choosing can research it for you.

It makes a difference in how a prosecutor will try the case, which means it makes a difference in how the MDT works together prior to the trial of the case, or any case for that matter. And finally, it can make a difference in how the forensic interviewer interviews the child, in terms of

obtaining information that addresses a child's delayed disclosure, or in other cases recantation information.

Case #1: Evidence is admissible

A reading of today's military case showed that the Government's lawyers were prepared for this defense well prior to trial, and understood the admissibility parameters of their rebuttal evidence. In their jurisdiction, there were certain "gatekeeper" conditions to the admissibility of the Government's expert testimony, including: (1) The defense had to raise the issue of "counterintuitive" behavior such as late reporting of abuse; and (2) The behavioral characteristics had to also be present in the victim's circumstances.

First, by raising the "counterintuitive" behaviors of late and incomplete reporting on cross examination, the Defendant put the victim's credibility in issue. As such, the Court of Appeals wrote, ***"The Government, on rebuttal, was entitled to rehabilitate their principle witness by explaining how her behavior did not necessarily undermine her credibility"***

Here, the Court of Appeals noted that other decisions in its jurisdiction had previously permitted experts to testify about behavioral characteristics or patterns of an alleged sexual abuse victim, especially where that behavior ***"would seem to be counterintuitive. . . In child sexual abuse cases, we have allowed expert testimony about why a child victim may give inconsistent statements, recant allegations, and delay reporting of abuse. . . The rationale for allowing such testimony is that 'the victim's behavior will not necessarily undermine his or her credibility if an expert can explain that such patterns of counterintuitive behavior occur often in sexual abuse cases.'"***

It is important to recognize that the expert cannot offer an opinion as to the credibility of believability of the child, or likewise the guilt or innocence of the Defendant -- or as the Court phrased it, be a "human lie detector."

Instead, addressing the second "gatekeeping" condition, the Court wrote: ***"An expert may testify as to what symptoms are found among children who have suffered sexual abuse and whether the child-witness has exhibited these symptoms; [and] discuss patterns of consistency in the stories of victims and compare those patterns with patterns in the victim's testify. . ."***

As previously indicated, it is important to know your specific state's rules regarding under what circumstances, as well as if at all, evidence regarding this type of evidence may be admitted. For example, many courts have determined that this type of evidence is not appropriate except as rebuttal evidence after the defense relies on a delayed outcry to attempt to prove the child's claim lacked credibility.

Other courts are more lenient, and have allowed such evidence in the state's main case, and even prior to the cross-examination of the alleged victim or anyone else with knowledge of the child's delayed disclosure. In Georgia, for example, it is common to see appellate cases approving expert testimony that states that a child "exhibited signs consistent with a child who had been sexually abused."

Finally, there are jurisdictions that shut the door on such testimony. The theory is that there is a "special aura" of expert testimony regarding personality profiles of sexually abused children. As such, jurors may "abandon" their role as fact finders and "adopt" the judgment of an expert. (See, e.g., language from *State v. Ballard*, 855 S.W.2d 557 (Tenn. 1993).

With all that said, there are always trial strategy decisions that can be made, whether the testimony will be admissible or not, as will now be addressed.

Case #2: Addressing delayed disclosure in voir dire

There is another way to address this topic of delayed disclosure, or any other topic that might create "counterintuitive friction." *Voir dire.* Today's example is *Jaime-Hernandez v. State,* an

unpublished Texas Court of Appeals case (14th District, Case No. 14-11-00474-CR, decided July 10, 2012).

There, the Defendant was convicted on two counts of aggravated sexual assault of a child. On appeal, the Defendant took issue primarily with the prosecutor's conduct during *voir dire*. For our purposes, we'll address two portions of the *voir dire* process conducted by the prosecutor.

Recall that *voir dire,* generally, is where the lawyers question prospective jurors to determine whether any them are biased as to the particular case, or otherwise cannot fairly judge the issues that will be in case. Having been through my share, I painfully understand that it can be a mind-numbing process. However, there is method to it, and the Texas prosecutor in today's case displayed it in full throat to the approval of the Court of Appeals.

The Defendant's appellate attorney criticized his trial attorney's failure to object to the prosecutor's *voir dire* discussion of "delayed outcry." First, the prosecutor asked the panel whether any of them were familiar with "delayed outcry." To his good fortune, there was a counselor on the panel who was familiar with the term, and who when prompted by the prosecutor defined it for the rest of the panel. When asked whether delayed outcry is common, the counselor replied, "I've never experienced it with any of my own students or clients, but it is common."

The prosecutor then asked the panel members whether any of them could think of reasons a child might delay telling someone what happened to him. To his extremely good fortune, the question elicited numerous responses including "fear," "embarrassment," and that the child is too young to understand what is going on.

Let's pause for a moment and consider Texas law on "commitment" questions during *voir dire*. "Commitment" questions are those that attempt "commit a prospective juror to resolve, or to refrain from resolving, an issue a certain way after learning a particular fact." Ultimately, the Court of Appeals wrote, "An improper commitment question attempts to create a bias or prejudice in the prospective juror before he has heard the evidence, whereas a proper voir dire question attempts to discover a prospective juror's preexisting bias or prejudice."

Now understanding the jurisdiction's rules related to commitment questions, let's consider the next passage in the opinion regarding the prosecutor's *voir dire.* I'll set it out the prosecutor's comments as they were in the opinion:

"You know, I have to worry about what you think of a sexual assault case where because of the delay in outcry there is no DNA evidence. I don't have Horatio Cane here from CSI. We don't have a little box that we wave up and down and it gives me all the DNA for the last 10 to 15 years. We don't have that. And because it's such a complicated thing that a child has been raped or sexually assaulted, and as you've heard people talk about here, there is a . . . delayed outcry. Unfortunately, because the outcry is delayed there is no tangible evidence. There is just not. Is there anyone here who would hold me to DNA evidence? Is there anyone here who would have to have DNA evidence to follow the law in this case?

Generally, a *voir dire* question is proper if it seeks to discover a juror's views on an issue applicable to the case. Here, the trial counsel for the Defendant was silent during this process and did not object. Defendant's appellate attorney argued on appeal that the trial counsel should have jumped up and down and objected on the grounds that this was a prime example of a "commitment" question at the least.

The Court of Appeals disagreed, noting that there was a prior appellate case allowing *voir dire* questions related to whether a venire panel could convict without DNA or medical evidence. It concluded simply that ***"The prosecutor's questions regarding delayed outcry and the lack of DNA evidence were not improper commitment questions."***

Best regards.

Andrew H. Agatston
Andrew H. Agatston, P.C.
145 Church Street, Suite 230
Marietta, Georgia 30060
(770) 795-7770
ahalaw@bellsouth.net
www.AgatstonLaw.com